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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

EASTERN ENTERPRISES,
Petitioner,

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF AMICI CURIAE OF THE OHIO VALLEY COAL COMPANY AND MAPLE CREEK MINING, INC. IN SUPPORT OF RESPONDENTS

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The Ohio Valley Coal Company and Maple Creek Mining, Inc., file this brief as amici curiae in support of the respondents. Each of the parties has consented to the filing of this brief, and the letters of consent have been lodged with the Clerk of this Court.*

* Pursuant to S. Ct. Rule 37.6, counsel for amici certify that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the amici, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF INTEREST OF AMICI CURIAE

The Ohio Valley Coal Company ("OVCC") and Maple Creek Mining, Inc. ("MCM") are small, independent coal mining companies operating in eastern Ohio and western Pennsylvania, respectively. OVCC began operations in 1970 as The Nacco Mining Company ("Nacco"); Nacco changed its name to OVCC in 1988. OVCC currently employs 358 miners represented by the United Mine Workers of America ("the UMWA").

OVCC is not a member of the Bituminous Coal Operators' Association, Inc. ("BCOA")—the multi-employer bargaining unit that has, since 1950, negotiated every National Bituminous Coal Wage Agreement ("NBCWA") with the UMWA. Rather, like many other small and medium-sized coal mining companies, OVCC has agreed through what are commonly called "me-too" agreements to be bound by the terms of the NBCWA, as modified by certain memoranda of understanding between OVCC and the UMWA. *See generally KenAmerican Resources, Inc.* v. *International Union, UMWA*, 99 F.3d 1161 (D.C. Cir. 1996). A "me-too" agreement is a contract identical to one negotiated by a union and multi-employer bargaining unit, signed by an employer who is not a member of that unit. That employer may enter into the "me-too" agreement either before or after the union and the multi-employer bargaining unit negotiate the master agreement.

In the year prior to the passage of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-22 ("the Coal Act"), OVCC paid $1,981,756.85 into benefit trusts for medical benefits for retired miners who never even worked for OVCC. Currently, OVCC pays $71,485.40 a year for such benefits. If this Court were to strike down the Coal Act as unconstitutional and return the industry to the pre-Act regime, OVCC would have to pay between $2,000,000 and $3,000,000 in additional liability each year. For 1997, for example, OVCC projects that, in the

absence of the Coal Act, it would have been forced to pay an extra $2,500,000 for health benefits for retired miners.

MCM has only been operating since 1995, and has a total retained deficit of several million dollars. It employs 363 UMWA-represented miners. Like OVCC, it is not a member of the BCOA, but has agreed to be bound by the NBCWA negotiated by the BCOA and the UMWA, as modified by certain memoranda of understanding. Currently, MCM pays $66,499.20 a year for health benefits for retired miners who never worked for it. Without the Coal Act, MCM estimates that it would be forced to disburse an additional $2,300,000 a year for such miners.

Both OVCC and MCM have entered into long-term sales contracts (up to eight years) for the sale of coal, on the basis of prices that do not factor in liability for funding retiree medical benefits for other companies. If the Coal Act is overturned and OVCC and MCM must return to paying for other companies' retirees, the continued existence of OVCC and MCM would be in serious jeopardy, along with the mining jobs those companies represent.

The interests of the BCOA and small and medium-sized coal companies like OVCC and MCM that are bound through "me-too" agreements to NBCWAs negotiated by the BCOA and UMWA do not always coincide. *See, e.g.*, *KenAmerican Resources*, 99 F.3d at 1165 n.3 ("It is worth noting that the interests of members of the Association may well be quite different than the Ohio Valley companies."). Although amici anticipate that the BCOA and UMWA will vigorously defend the constitutionality of the Coal Act, the Court's decision in this case will have a direct impact beyond those immediate parties, and indeed will directly affect the viability of independent coal companies such as OVCC and MCM. Amici file this brief to ensure that the Court is aware of the nature of that impact, and its pertinence in analyzing the legal questions presented.

SUMMARY OF ARGUMENT

Petitioner Eastern Enterprises and its amici neglect to discuss how the Coal Act affected the many small and medium-sized independent coal mining companies that entered into "me-too" agreements with the UMWA. Before the Coal Act was enacted, these companies—which tend to have less capital at their disposal than BCOA members, or non-BCOA members large enough to negotiate separately with the UMWA—had great difficulty meeting the obligation to pay for retiree health benefits. The difficulty arose from the fact that such small companies were forced to pay millions of dollars annually for benefits for retired miners who had never worked for them, because the companies for whom these retirees had worked had left the field without providing for them. Striking down the Coal Act as unconstitutional would return independent coal mining companies to this untenable situation, precipitating a progressively deepening crisis in the industry as the renewed burden forces the closure of company after company.

Such an unpalatable result is by no means required, because insisting that the former employers of the retired miners fund their health benefits does not violate any provision of the Constitution. The decision about how to allocate economic burdens and benefits in resolving a public policy problem such as the crisis in retired miner health benefits is vested under our constitutional system in Congress, and at least since the demise of the *Lochner* era the judiciary has declined to second-guess such legislative policy judgments under the guise of the Due Process Clause. If any rational basis for the congressional decision can be imagined, the legislative determination will be upheld. Here one rational purpose of the Act is to broaden the funding base for retiree health benefits, thus preventing independent coal companies from bearing onerous liability for retired miners who never worked for them. This affords those companies a better opportunity to compete fairly in the industry today, helping promote a healthy and

viable coal industry and ensure more stable funding of benefits for present and future retirees.

Nor does the Coal Act effect a taking of property within the meaning of the Takings Clause. Prior to passage of the Coal Act, independent companies such as OVCC bore unreasonable and excessive liability for retiree health benefits, while many companies that had benefitted from the work of the retirees dumped the burden of paying for benefits for those retirees on others, while paying little or nothing themselves. Congress and the President saw fit to solve the resulting crisis by restructuring the economic benefits and burdens of those who were participating or had participated in the coal industry by passing the Coal Act. Such a reordering does not give rise to a taking. The former employers are not being unfairly singled out to bear a burden that should be borne by the public at large—the hallmark of a taking—but are simply being made to shoulder obligations which Congress could reasonably conclude were their responsibility in the first place.

ARGUMENT

I. STRIKING DOWN THE COAL ACT WOULD HAVE A PARTICULARLY DEVASTATING EFFECT ON INDEPENDENT COAL MINING COMPANIES SUCH AS OVCC AND MCM.

Coverage under the Coal Act extends to companies that are bound by one of the NBCWAs negotiated by the BCOA and the UMWA. The Act is not limited in its reach, however, to the large coal mining companies—Consolidation Coal Company, Peabody Coal Company, Eastern Associated Coal Company, Arch Minerals' Apogee Coal Company, and Zeigler Coal's Old Ben Coal Company—that are members of the BCOA. It also covers the many small and medium-sized companies bound to the terms of an NBCWA because they executed a "me-too" agreement with the UMWA, agreeing to be bound by the

pact entered into by the BCOA and the UMWA, even though these smaller companies did not participate in the negotiations.

Smaller employers enter into such "me-too" agreements for a variety of reasons. As one court has explained:

> [T]he basic purpose of a "me-too agreement" is to allow independent, usually smaller, employers to obtain all the benefits of the master collective bargaining agreement that is negotiated by the principal employers in the industry without having to participate in the industry negotiations, or to engage in separate negotiations, every few years. Thus, the independent employer is assured that (1) it will not be subject to a contract containing more onerous conditions than are applicable to its competitors, (2) it will obtain whatever protections or advantages the industry collective bargaining agreement provides other employers, (3) it will be saved the cost of expensive negotiations, and * * * (4) it will be covered by an agreement whenever the rest of the industry is covered and not subject to an agreement whenever the rest of the industry is not. [*Arizona Laborers, Teamsters and Cement Masons Local 395 Health and Welfare Trust Fund* v. *Conquer Cartage Co.*, 753 F.2d 1512, 1518 (9th Cir. 1985).]

As detailed in the Statement of Interest of Amici Curiae with respect to OVCC and MCM, smaller companies bound to the NBCWA through a "me-too" agreement would incur dramatically higher costs for benefits for retirees who never worked for those companies if the Coal Act is struck down. Whatever the consequences for the large companies that are members of the BCOA, such increased costs could well affect the viability of many small and medium-sized "me-too" companies, which are particularly susceptible to cost pressures. That is especially true of those companies that—like OVCC and MCM—have entered into long-term coal sales agreements based on cost calculations that assumed the validity of the Coal Act.

The potentially devastating impact of requiring the smaller "me-too" companies to shoulder the burden of providing benefits for retirees who worked for other companies is a factor Congress was entitled to weigh in seeking a solution to the health care crisis affecting the entire industry. This is hardly an insignificant matter, since BCOA companies account for only one-half of the UMWA-mined coal in the United States.

II. THE COAL ACT DOES NOT VIOLATE PETITIONER'S SUBSTANTIVE DUE PROCESS RIGHTS.

"There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy." *Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963). The Court, however, has long since returned "to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.* at 730.

For this reason, "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and * * * the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (citations omitted). Economic legislation, regardless of whether it is applied retroactively or prospectively, is accorded "strong deference," and need only be "supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Moreover, it does not matter whether the reason submitted in support of the statute actually motivated the legislature to enact it; "those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." *FCC* v. *Beach Communications,*

Inc., 508 U.S. 307, 315 (1993) (internal quotation marks and citations omitted).

The Coal Act is simply one example of Congress readjusting economic benefits and burdens to address a public policy problem—how to fund health benefits for retired miners, benefits Congress could conclude the miners reasonably believed they were entitled to receive. The issue is not the validity of that conclusion. As the Court has explained:

> In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. * * * [H]owever, those challenging [a] legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker. [*Vance* v. *Bradley*, 440 U.S. 93, 110-111 (1979).]

The issue, then, is simply whether there is a plausible reason for Congress to allocate the burdens of funding health benefits for retired miners in the manner it did. Prior to passage of the Coal Act, companies bound to the NBCWA and continuing to operate bore an increasingly crushing liability to fund such benefits, not only for their own miners but for miners who had worked for other companies which had left the field and failed to meet their obligations to those who had worked for them. One reasonable solution—the one adopted by Congress—was to broaden the funding base by requiring companies which had previously signed NBCWAs to pay health benefits for their former employees and, if necessary, a proportional amount for those retired miners who could not be traced to a specific viable company. *See Usery*, 428 U.S. at 18 ("[I]mposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor"); *United States* v. *Sperry Corp.*, 493 U.S. 52, 64-65 (1989) ("It is surely

proper for Congress to legislate retrospectively to ensure that the costs of a program are borne by the entire class of persons that Congress rationally believes should bear them.").

While petitioner and its amici trumpet the alleged unfairness of imposing unforeseen obligations on them, Congress was free to decide that it was more unfair to impose retiree funding obligations on companies for whom the retirees had never worked. Congress was also free to weigh in the balance the consequences of imposing that burden on currently operating companies as opposed to companies that had left the industry, and to consider the importance of ensuring a healthy and viable coal industry to the Nation's economy. To the extent saddling operating companies like OVCC and MCM with responsibility for other companies' retirees would make it difficult or impossible for the operating companies to remain in business, Congress was free to conclude that it was more desirable to impose the responsibility on the companies for which the retirees actually had worked.

In any event, that debate—whether to impose the funding obligation on companies for which the retirees had worked or on currently operating coal companies for which they had never worked—is plainly one for the political process. Those advocating petitioner's view of what is fair and reasonable vigorously opposed the Coal Act, but their arguments failed to carry the day in the face of competing notions of fairness and justice. The political process remains open to those proponents, and in fact they recently sought to overturn the Act in Congress—where the issue should be resolved—but were again unsuccessful. *See* H.R. 1370, 104th Cong. (1995).

Petitioner and its supporters thus "lost a political battle in which [they] had a strong interest." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). "[B]ut this is neither the first nor the last time that such a result will occur in the legislative forum" (*id.*), and

"[t]he Constitution presumes that, absent some * * * antipathy [to the objecting parties], even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance* v. *Bradley*, 440 U.S. at 97 (footnote omitted).

III. THE COAL ACT DOES NOT EFFECT A TAKING UNDER THE TAKINGS CLAUSE.

This Court has noted that

> [a] "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government * * * than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. [*Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978).]

The Coal Act is a classic example of the latter kind of program. By shifting most of the health benefit costs for retiree miners to companies for which they had worked, the Act solved a funding crisis that threatened to deny retired miners expected health benefits and to put the coal mining companies that had been bearing those costs—such as the amici—out of business. Congress was free to conclude that this "promote[d] the common good." *Id.*

In *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), the Court rejected a challenge to the Multiemployer Pension Plan Amendments Act, noting that Congress "determined that unregulated withdrawals from multiemployer plans could endanger their financial vitality and deprive workers of the vested rights they were entitled to anticipate would be theirs upon retirement" and that, "[f]or this reason, Congress imposed withdrawal liability as one part of an overall statutory scheme to safeguard the solvency of private pension funds." *Id.* at 227-228.

Similarly, in this case, Congress determined that companies such as petitioner had contributed to a funding

crisis by refusing to pay for the health benefits of thousands of their former employees and by forcing small independent coal companies such as the amici to shoulder this burden instead. Congress recognized that this situation could leave many retired miners without long-anticipated health benefits, and enacted a comprehensive statute to solve the problem, part of which requires companies such as petitioner to pay for health benefits for their former employees. This is simply "adjusting the benefits and burdens of economic life to promote the common good," *Penn Central*, 438 U.S. at 124, and, as in *Connolly*, does not rise to the level of a taking.

CONCLUSION

For the foregoing reasons, and those in the briefs for respondents, the judgment below should be affirmed.

Respectfully submitted,

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